Chiropractic Specialty Centre Sdn Bhd v Orthorelief & Care Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)-1484–08 OF 2016
HAMID SULTAN, HARMINDAR SINGH JJCA AND YEOH WEE SIAM J
23 OCTOBER 2017

Contract — Misrepresentation — Recission — Appeal against the High Court judgment — Award of arbitrator — Affirming arbitrators award — Exclusion clause and entire agreement clause — Whether arbitrator wrong in law to deal with issue of misrepresentation before franchise agreement executed considering exclusion clause and entire agreement clause

The appellant and respondent had entered into a franchise agreement. The respondent had purchased goods from the appellant based on representations made by the appellant, through its director. The representations made by these were later found to be false. The respondent then sought to rescind the franchise agreement and restitution of the value of the machines. The appellant filed a counterclaim against the respondent seeking damages for tarnishing the appellant's reputation, mishandling equipment, violating the appellant's intellectual property rights and breaching the franchise agreement. The arbitrator allowed the respondent's claim in part. The issue in this appeal was whether the arbitrator was wrong in law to deal with misrepresentation before the franchise agreement was executed considering the exclusion clause and entire agreement clause.

Held, dismissing the appeal with costs of RM10,000 subject to allocator:

(1) Representation and misrepresentation were not one and the same in the legal sense. The exclusion clause would not have the effect of excluding the appellant's liability regarding misrepresentation. Misrepresentation would not have the protection of the exclusion and entire agreement clauses (see para 7).

(2) The court would not intervene to set aside the award unless it was shown that the award was manifestly unlawful and unconscionable to subsist. No reasonable tribunal appraised of the facts of the case as well as the application of the law by the arbitrator will succumb to the argument that the award in its totality was patently unjust or unconscionable or manifestly unlawful for the court to intervene to set aside the award. This was not a fit and proper case for appellate intervention (see paras 14–15).

[Bahasa Malaysia summary

Perayu dan responden telah memasuki perjanjian francais. Responden telah membeli barangan daripada perayu berdasarkan representasi yang dibuat oleh perayu, melalui pengarahnya. Representasi yang dibuat oleh mereka kemudiannya didapati adalah palsu. Responden kemudiannya memohon untuk membatalkan perjanjian francais tersebut dan restitusi nilai mesin-mesin tersebut. Perayu memfailkan tuntutan balas terhadap responden dengan memohon ganti rugi kerana merosakkan reputasi perayu, salah pengendalian barangan, mencabuli hak harta intelektual perayu dan melanggar perjanjian francais tersebut. Penimbang tara membenarkan sebahagian tuntutan responden. Isu dalam rayuan ini adalah sama ada penimbang tara adalah salah dari segi undang-undang untuk menguruskan misrepresentasi sebelum perjanjian francais dilaksanakan dengan mempertimbangkan klausa pengecualian dan keseluruhan klausa perjanjian.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000 tertakluk kepada alokator:

(1) Representasi dan salah nyata bukan satu dan sama di sisi undang-undang. Klausa pengecualian tidak akan mempunyai kesan pengecualian liabiliti perayu berkaitan salah nyata. Salah nyata tidak akan mempunyai perlindungan pengecualian dan keseluruhan klausa-klausa perjanjian (lihat perenggan 7).

(2) Mahkamah tidak akan campur tangan untuk mengetepikan award kecuali ia ditunjukkan bahawa award adalah jelas tak sah dan tidak berpatutan untuk wujud. Tiada tribunal yang munasabah menilai fakta kes dan juga permohonan undang-undang oleh penimbang tara akan tunduk kepada hujahan bahawa award secara keseluruhannya adalah jelas tidak adil atau tidak berpatutan atau jelas tak sah untuk mahkamah mencelah bagi mengetepikan award tersebut. Ini bukan kes yang sesuai dan wajar bagi campur tangan mahkamah rayuan (lihat perenggan 14–15).]

Notes

For cases on recission, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6090–6098.

Cases referred to

Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd [2008] 3 CLJ 791, CA (refd)

Inntrepreneur Pub Co v East Crown Ltd [2000] 2 Lloyds Rep 611, Ch D (refd)

Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd [2016] 2 MLJ 697; [2016] 3 CLJ 403, CA (refd)

SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd [2014] 2 MLJ 627, CA (refd)

Legislation referred to

Arbitration Act 1952 (repealed by Arbitration Act 2005)
Arbitration Act 2005 ss 37, 42

Appeal from: Originating Summons No WA-24NCC-288–07 of 2016 (High Court, Kuala Lumpur)

Tharminder Singh (Lim Soon Seng with him) (Izral Partnership) for the appellant.
Ravi Nekoo (Hakem Arabi & Assoc) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant appeals against the judgment of the High Court which refused to set aside the award of the arbitrator pursuant to ss 37 and 42 of the Arbitration Act 2005 ('the AA 2005'), in relation to a franchise agreement.

[2] There was only one principal complaint raised before us on the date of hearing of the appeal. They were related to s 42 of the AA 2005. The appellant says:

(a) the arbitrator was wrong in law to deal with the issue of misrepresentation before the franchise agreement was executed in the light of exclusion clauses and the entire agreement clause, particularly cll 20.1 and 22 which read as follows:

> Clause 20
>
> The franchisee acknowledges that prior to having executed this agreement it has carefully read the provisions of this agreement and *has understood them and has not relied upon any statement, representation or waiver made by the franchisor or its servant, agent other than as set out herein*.
>
> Clause 22
>
> 22.1 This agreement sets forth the *entire agreement and understanding* between the parties as to the subject matter of this agreement and *emerges all prior discussion between them* and *neither of the party shall be bound by any conditions, definitions and warranties or representations* with respect to the subject matter of this agreement other than as expressly provided in this agreement duly set forth or subsequent to the date hereof in writing and signed by a proper and duly authorised representative of party to be bound thereby.
>
> 22.2. This agreement *supersedes any prior agreement between the parties whether written or oral* and any such prior agreement is cancelled as at the commencement date but without prejudice to any rights which had been accrued to any of the parties.

[3] The other complaint which the appellant touch upon was related to

damages and in the submission it reads as follows:

> (c) in assessing what should be diminution value of the RxDecom equipment without TMS, the arbitrator had decided the value on his own accord without calling for submissions and evidence, thus constituting breach of natural justice.

BRIEF FACTS

[4] The brief facts of the case can be summarised as follows:

(a) the respondent was the claimant in the arbitration proceeding;

(b) the respondent had entered into a franchise agreement with the appellant;

(c) on the representations made by the appellant, through its director, Dr Yama Zafer, the respondent had purchased several machines, namely RxDecom, Theaflex and Spinercise;

(d) the respondent found that the said representations were false and sought rescission of the franchise agreement and restitution of the sum of RM629,344.50, ie the value of the machines;

(e) the appellant denied there were any false representations;

(f) the appellant claimed that the machines failed due to the respondent's inability to operate them correctly and/or due to the mishandling of the said machines and/or poor management of the staff handling these machines; and

(g) the appellant had also filed a counterclaim against the respondent seeking damages for tarnishing the appellant's reputation, mishandling the equipment, violating the appellant's intellectual property rights and breaching the franchise agreement.

[5] The arbitrator partly allowed the respondent's claim. The memorandum of appeal before us reads as follows:

> (1) In all the circumstances of the case, the High Court erred in law and in fact in dismissing the Appellant's said application.
>
> (2) The High Court erred in law and in fact holding that the arbitration clause in question has included a broad scope justifies the Award under challenge. In so doing, the High Court did not at all or properly take into account or sufficiently or properly appreciate or otherwise the following matters:
>
> (a) properly interpret and apply the entire agreement clause as found in Clause 20 as well as Clause 22 of the Franchise Agreement which amongst others expressly negates any representation that is not expressly set out in the Franchise Agreement itself;

(b) note that there were 2 separate transactions, namely, the Franchise Agreement as between the Appellant and the Respondent and a distinct purchase of machines and equipment transaction by the Respondent from Theramod (M) Sdn Bhd; and

(c) the allegation of misrepresentation stemmed from the purchase of the machine and equipments transaction as between the Respondent and Theramod (M) Sdn Bhd in which the Appellant was neither a party nor privy.

(3) The High Court erred in law and fact in holding that the Plaintiff (instead of Dr Yama Zafer) had made a representation as to the merchantable quality and lack of defect of machines supplied by Theramod (M) Sdn Bhd.

(4) The High Court erred in law and in fact in holding that Theramod (M) Sdn Bhd was not liable to the Respondent and/or that the Respondent and Theramod (M) Sdn Bhd did not have privity of contract.

(5) The High Court erred in holding that the grounds posed was one fact instead of law.

(6) The High Court erred in holding that the Arbitrator had arrived at an accurate construction based on the facts before him without referral to the ambit and applicability of the current provisions of the Franchise Agreement.

(7) The High Court erred in failing to hold that the Arbitrator erred in law in making the Award in paragraphs 70(1) and 70(2) against the Appellant notwithstanding that the Appellant is neither party nor privy to the transaction between Theramod (M) Sdn Bhd and the Respondent for the purchase of machines or equipment.

(8) The High Court erred in failing to hold that the Arbitrator erred in law in making the Award in paragraphs 70(1) and 70(2) notwithstanding that there was no arbitration agreement between the Appellant, the Respondent and/or Theramod (M) Sdn Bhd concerning the purchase of machines or equipment, the subject matter of the claimed misrepresentation.

(9) The High Court erred in failing to hold that the Arbitrator erred in law in erroneously interpreting or construing Clause 20 and 22 of the Franchise Agreement, allowing him liberty to consider matters beyond and outside of the said Franchise Agreement to determine if there had been representations (not expressly set out or stated in the said Franchise Agreement) which may have resulted in the Respondent entering into the Franchise Agreement with the Appellant.

(10) The High Court erred in failing to hold that the Arbitrator erred in law in unilaterally making adjustments as to the Award made in respect of the RxDecom machine without calling for any evidence or submissions from the parties on the question of quantum.

(11) The High Court erred in failing to hold that the Arbitrator erred in law in allowing the damages for RM 18,750 being the fee for unutilised Franchise Period of 45 months out of 60 months.

(12) The High Court erred in failing to hold that the Arbitrator erred in law in failing to consider the admission arising from the Respondent's failure to cross-examine the Respondent's witnesses (including RW1 — Dr Yama Zafer) as to the loss and damage suffered by the Appellant and to accordingly make an award in that respect.

(13) In all the circumstances of the case, the High Court ought to have allowed the Appellant's said application and set aside the Award and consequential relief.

[6] The learned counsel for the appellant anchors the argument on s 42 to say that the arbitrator had erred by law in erroneously interpreting or construing cll 20 and 22 of the franchise agreement by considering evidence and submission beyond and outside of the franchise agreement.

[7] What is important to note in the instant case is related to the issue that the equipment supplied was not fit for the purpose and in consequence the respondent suffered loss. In addition, both parties had led evidence before the arbitrator in respect of the agreement as well as representation of parties before the franchise agreement was executed. The issue here is whether misrepresentation will have the protection of cl 20 or cl 22. In our view, representation and misrepresentation are not one and the same in the legal sense. Exclusion clause may not have the effect of excluding liability. Lightman J in the case of *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyds Rep 611 had held:

> An entire agreement clause does not preclude a claim for misrepresentation, for the denial of contractual force to a statement cannot affect the status of a statement as a misrepresentation.

[8] Lightman J's approach is one related to common sense as well as commercial reality. No person of sound mind will agree to exclude misrepresentation, fraud, deceit, etc. Even if such a clause is included in an agreement, it may lie upon the court, not to recognise such a clause on public policy grounds. It all depends on the facts and the gravity of impropriety of such clause in a contractual document. Though unfair contract terms such as in England is not part of our law, the court to maintain rule of law is sufficiently empowered to arrest any oppressive conduct through the well establish concept of 'public policy'.

[9] The learned arbitrator had considered cl 20 as well as cl 22 and the learned counsel for the respondent had summarised it. That part of the submission as well as other evidence read as follows:

9.2 The learned arbitrator had dealt with this issue at p 7 paras 22, 23 and 24 of his final award.

In respect of Clause 22, this is what he says at paragraph 23:

> ... Clause 22, reasonably construed, merely states that the parties were bound by the express terms and warranties expressly provided for in the Franchise Agreement. This provision does not exclude the operation of other terms, conditions, warranties or representations that had not been expressly provided in the Franchise Agreement.

In respect of Clause 20, this is what he says at paragraph 24:

> With respect to Clause 20, it provides that the Claimant acknowledged that it did not rely on any representation or statement made by the Respondent before it signed the Agreement, other than set out 'herein'. To require the Claimant to purchase equipment/machines from only stipulated vendors in order to meet the needs of the Franchise Agreement must come with it a form of assurance that the equipment/machines work in compliance with the Franchise Agreement. This is consistent with the Claimant also stating that the representations are also contained in some of the documents, namely the Franchise Training Operations Manual. Clause 20 therefore does not bar an argument contending that the Claimant relied on representations contained in the documents supplied by the Respondent.

The Arbitrator had taken cognisance of the fact that there were several documents that were being relied on by the Respondent at the arbitration proceedings in addition to the Franchise Agreement, ie;

a. The training manual

b. Franchise Disclosure Document

c. Operations Manual

9.3 The representations were also contained in these document. The fact that these documents would be referred to in the arbitration proceedings was duly notified to the Appellant in the notice of arbitration.

[10] We have read the appeal record and able submissions of the learned counsels. After giving much consideration to the submission of the appellant, we take the view that the appeal must be dismissed in limine. Our reasons, inter alia, are as follows:

(a) it is well established even under the old regime related to the Arbitration Act 1952, the court will not intervene to set aside the award unless it has been shown that the award was manifestly unlawful and unconscionable to subsist (see *Crystal Realty Sdn Bhd v Tenaga Insurance (Malaysia) Sdn Bhd* [2008] 3 CLJ 791);

(b) the Court of Appeal decision in *Crystal Realty*'s case was followed in the case of *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd* [2016] 2 MLJ 697; [2016] 3 CLJ 403 as well as a number of cases including

SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd [2014] 2 MLJ 627, where the Court of Appeal reiterated as follows:

> ... the final award of the arbitrator must be viewed in its totality and, any error of law on the face of the award must be one that is patent and obvious as to render the award manifestly unlawful and unconscionable to subsist and, thereby justify it to be set aside.

(c) no reasonable tribunal appraised of the facts of the case as well as the application of the law by the arbitrator will succumb to the argument that the award in its totality was patently unjust or unconscionable or manifestly unlawful for the court to intervene to set aside the award.

[11] For reasons stated above, we do not think that this is a fit and proper case for appellate intervention. The appeal is dismissed with costs of RM10,000 subject to payment of the allocatur fees. Deposit is to be refunded.

We hereby ordered so.

Appeal dismissed with costs of RM10,000 subject to allocator.

Reported by Fatin Mohd Ismail